U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D- INC.

DATE: DEC. 31, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a software development and e-learning company, seeks to employ the Beneficiary as a programmer analyst II. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Acting Director of the Nebraska Service Center denied the petition, concluding that the record did not establish the *bona fides* of the job offer. The Director entered a finding of fraud against the Petitioner due to misrepresentation of material facts regarding the offered position described on the labor certification, and she invalidated the labor certification application.

On appeal, the Petitioner submits additional evidence and asserts that the job offer is *bona fide*. It states that it did not fraudulently or willfully misrepresent the offered position on the labor certification and asserts that invalidation of the labor certification is improper.

Upon *de novo* review, we will withdraw the Director's decision and remand the matter for further proceedings consistent with our opinion and for the entry of a new decision.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is March 1, 2017. *See* 8 C.F.R. § 204.5(d).

Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national applies for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. JOB OFFER

A petitioner must intend to employ a beneficiary under the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming a denial where, contrary to an accompanying labor certification, a petitioner did not intend to employ a beneficiary as a domestic worker on a full-time, live-in basis). For labor certification purposes, the term "employment" means "[p]ermanent, full-time work." 20 C.F.R. § 656.3. A labor certification remains valid only for the geographic area of intended employment stated on it. 20 C.F.R. § 656.30(c)(2). If a petitioner intends to employ a beneficiary outside the stated area of employment, USCIS may deny the petition. *Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979)

On the labor certification, the Petitioner listed its address as [redacted] Ohio, and it listed the worksite for the offered job of programmer analyst II as [redacted] of the same address.[2] In a notice of intent to deny (NOID), the Director stated that USCIS conducted a site visit at the Petitioner's place of business at [redacted] Ohio. The following discrepancies were noted during the visit:

- The Petitioner's office has approximately 12 computer workstations and is less than 1,500 square feet.
- Only four persons were present, including the owner and marketing manager. The petition and labor certification indicated that the Petitioner employs 59 employees; however, the Petitioner was unable to present evidence that it had contracts or sufficient work to support 59 employees.
- The Petitioner claimed it was developing a GPS locator program, but was unable to clarify what made the program unique or proprietary.
- The Petitioner claimed it was developing an electronic health records management application for use by chiropractors. However, the Director indicated that the Petitioner does not "have any available software products, list of potential clients for any software products, nor has the petitioner partnered with any trade allies at this time in the development of these products."

Thus, the Director found that the results of the site visit cast doubt on the veracity of the offered job. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.* In the NOID, the Director stated that the inconsistencies indicated a willful misrepresentation by the Petitioner of the material facts of the offered job and its

[2] On the petition, the Petitioner listed its address as [redacted] and it listed the offered job's worksite as [redacted]

duties. The Director requested evidence clarifying the issues listed above, including a lease for the premises at Ohio; documentation regarding current in-house projects, including a project timeline, names of persons currently working on the project and their capacities within the project; copies of contracts related to the Beneficiary's current position if he is posted to an end-client work site location; evidence that the Beneficiary's service on the end-user agreement will continue, if applicable; and a listing and staffing description of all of the Petitioner's master service agreements/contracts valid from the date of the labor certification onward. It appears that the Director questioned whether the offered job will actually be performed at the location stated on the labor certification, and whether the Petitioner intends to employ the Beneficiary in a full-time, permanent position. However, the Director's decision does not sufficiently articulate and analyze these bases for denial.

Instead, the Director denied the petition because the job offer is not *bona fide*. The Director reviewed the evidence in the record regarding the Petitioner's office location and determined that the evidence did not corroborate the Petitioner's current operation at the Ohio location. However, the Director did not sufficiently analyze the issue of whether the offered job will actually be performed at the location stated on the labor certification. We note that four of the Petitioner's employees were present at on the day of the site visit, and that based on the materials submitted to the record, it appears that the Petitioner is currently operating, at least in a limited capacity, at the address listed on the labor certification. On remand, the Director should determine whether the offered job will actually be performed at the location stated on the labor certification.

The Director also concluded that the evidence submitted regarding the Petitioner's current in-house projects, the Beneficiary's current employment with the Petitioner, and the Petitioner's current contracts and payroll, was insufficient. *See Matter of Ho*, 19 I&N Dec. at 591-92. However, she did not sufficiently analyze how these current factors adversely affect the Petitioner's prospective intent to employ the Beneficiary in the full-time, permanent position of programmer analyst II. On remand, the Director should determine whether the Petitioner intends to employ the Beneficiary in a full-time, permanent position.

III. FRAUD AND INVALIDATION OF THE LABOR CERTIFICATION

The Director entered a finding of fraud against the Petitioner due to misrepresentation of material facts regarding the offered position described on the labor certification. Any foreign person who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under the Act is inadmissible. *See* section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i).

As outlined by the Board, a material misrepresentation requires that one willfully make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975). The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Tijam*, 22 I&N Dec. 408, 425 (BIA

1998); *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). To be considered material, the misrepresentation must be one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility, and which might well have resulted in a proper determination that he be excluded." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).

Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, he or she must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and 3) that the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. at 288. In addition to the three elements listed above, fraud requires a finding that the petitioner or beneficiary knowingly made a false representation of a material fact with the intent to deceive a U.S. government official authorized to act upon the request. *See Matter of Tijam*, 22 I&N Dec. at 424; *see also* USCIS Policy Manual, Vol. 8, Part J, Ch. 2, https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume8-PartJ-Chapter2.html#S-C (last visited Nov. 30, 2018). Here, the Director's finding of fraud was not supported by an adequate analysis of these factors. We will therefore withdraw the Director's finding of fraud against the Petitioner.

The regulation at 20 C.F.R. § 656.30(d) provides, in pertinent part:

> Invalidation of labor certifications. After issuance, a labor certification may be revoked by ETA using the procedures described in Sec. 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application.

Based on the finding of fraud involving the labor certification application, the Director invalidated the labor certification. As discussed above, we have withdrawn the finding of fraud against the Petitioner. Therefore, we will reinstate the labor certification. On remand, the Director may pursue a finding of fraud or misrepresentation in connection with the labor certification, provided that the Director does so in accordance with relevant regulations and case law.

IV. ABILITY TO PAY THE PROFFERED WAGE

On remand, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date. The proffered wage is $90,584 to $91,000 per year. The record must show the Petitioner's ability to pay the proffered wage from the priority date of March 1, 2017, onward.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

The record contains the 2016 federal tax return for the Petitioner. The record does not contain an annual report, federal tax return, or audited financial statements for the Petitioner as of the priority date in 2017 as required by 8 C.F.R. § 204.5(g)(2).[3]

V. THE BENEFICIARY'S EXPERIENCE

On remand, the Petitioner must establish that the Beneficiary possessed the experience required by the labor certification as of the priority date. A beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). In this case, the labor certification requires a master's degree and 12 months of experience in the job offered of programmer analyst II, or a bachelor's degree and six years of experience in the job offered. Because the Beneficiary has a the equivalent of a bachelor's degree, but not a master's degree, the Petitioner must establish that the Beneficiary has six years of experience in the job offered.

The labor certification states that the Beneficiary qualifies for the offered position based on experience as a software developer with [redacted] in [redacted] New Jersey, from March 21, 2008, to March 1, 2017.[4]

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. *See* 8 C.F.R. § 204.5(g)(1).

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[3] The record does not establish that the Petitioner employs 100 or more workers.

[4] We note that a letter dated June 1, 2018, from [redacted] President of the Petitioner, states that the Petitioner currently employs the Beneficiary at the office of [redacted] in H-1B nonimmigrant visa status. However, USCIS records show that the Petitioner's H-1B nonimmigrant visa petition was denied on May 7, 2018, for the position of software developer applications. The Beneficiary's most recent Form I-797A, Notice of Action, shows that he was granted H-1B nonimmigrant status with [redacted] for the period from June 1, 2017, to September 30, 2018.

The record contains an experience letter dated June 19, 2017, from the Assistant Manager-HR Operations, of , stating that the Beneficiary has been an employee of since March 31, 2008. It states that the Beneficiary "is working with us as a Technical Lead in Texas." It further states that the letter "cannot be used as a formal detailed experience letter."

We note that the letter was issued by It does not clarify the relationship between and the entity listed as the Beneficiary's employer on the labor certification. Further, the letter verifies the Beneficiary's employment as a technical lead, but not as a programmer analyst II as required by the labor certification. Additionally, the letter states that the Beneficiary worked in Texas, while the labor certification states that he worked in New Jersey. The letter also states that it cannot be used as an experience letter.

VI. CONCLUSION

The decision of the Director will be withdrawn. We will withdraw her finding that the Petitioner fraudulently made a misrepresentation involving the labor certification, and we will reinstate the labor certification. The matter is remanded to the Director for consideration of whether the job will actually be performed at the location stated on the labor certification; whether the Petitioner intends to employ the Beneficiary in a full-time, permanent position; whether the Petitioner has the continuing ability to pay the proffered wage; and whether the Beneficiary has the required experience for the offered position. The Director may request any additional evidence considered pertinent. Similarly, the Petitioner may provide additional evidence within a reasonable period of time to be determined by the Director. Upon receipt of all the evidence, the Director will review the entire record and enter a new decision.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

Cite as *Matter of D- Inc.*, ID# 1815076 (AAO Dec. 31, 2018)